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No. 84-490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS OIL & GAS CORP.,

Petitioner,

v.

ARKLA EXPLORATION COMPANY,
STATE OF ARKANSAS,
WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR ARKLA EXPLORATION COMPANY AND THE STATE OF ARKANSAS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether review by writ of certiorari should be granted in this case in which there is no conflict among the circuits because (a) the litigation in the District of Columbia (i) proceeded with the explicit judicial recognition that that litigation excluded any issues dealing with known geological structures (KGS) and (ii) proceeded with the consent of the Petitioner here that KGS issues could be addressed in subsequent litigation after the D.C. Circuit had ruled, and (b) the litigation in the Eighth Circuit was (i) exclusively concerned with the KGS issue and (ii) acquiesced in the entire substance of the D.C. Circuit's ruling on the non-KGS issue?

2. Whether review by writ of certiorari should be granted in this case in which the court below (a) enjoined the Secretary from following a procedure which (i) was inconsistent with the Secretary's prior rulings and (ii) which the Secretary has subsequently conceded was inconsistent with the controlling law, and (b) in which the judgment affirmed below is in any event explictly limited to the specific facts and specific parcel of real estate in controversy?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The list, under the heading "parties", in the Petition for a Writ of Certiorari omits the State of Arkansas, which was a plaintiff in the proceedings before the United States District Court for the Western District of Arkansas and an appellee in the United States Court of Appeals for the Eighth Circuit.

The list in the Petition also omits the State of Alaska, which joined the brief *amicus curiae* before the Eighth Circuit.

Since Rule 21.1(b) only requires a listing of parties "to the proceeding in the court whose judgment is sought to be reviewed," Respondents do not here respond to the reference in the Petition under the heading "parties" which refers to the proceedings in various courts and agencies whose judgments do not appear to be the subject of any petition for review.

Respondent Arkla Exploration Company is a wholly owned subsidiary of Arkla, Inc. which has no subsidiaries nor affiliates (except for wholly owned subsidiaries).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
GROUNDS FOR JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
ARGUMENT	15
1. No conflict exists between the decision of the D.C. Circuit and the decision of the Eighth Circuit.	15
2. The Eighth Circuit closely followed the well-settled interpretation of the statute and the Department's own prior interpretation of the statute.	20
3. The decision does not cloud title	26
CONCLUSION	30
APPENDIX:	
A. BLM Instruction Memorandum No. 84-35 (October 14, 1983)	

TABLE OF AUTHORITIES

CASES — Page

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 27

Arkla Exploration Co. v. *Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984) ..... passim

Arkla Exploration Co. v. *Watt*, 562 F.Supp. 1214 (W.D.Ark. 1983) ..... passim

Arkla Exploration Co. v. *Watt*, 548 F.Supp. 466 (W.D.Ark. 1982) 1, 14, 16, 27

Atlantic Richfield v. *Hickel*, 303 F.Supp. 724 (D.Wyo. 1969) aff'd, 432 F.2d 587 (10th Cir. 1970) 25

California v. *Udall*, 296 F.2d 384 (D.C.Cir. 1961) ... 25

Crown Cork & Seal Co. v. *Parker*, 462 U.S. 345, 76 L.Ed. 2d 628 (1983) 28

Harrison v. *Northern Trust Co.*, 317 U.S. 476 (1942) 26

Keller v. *Adams-Campbell Co.*, 264 U.S. 314 (1923) 21

Layne & Bowler Corp. v. *Western Well Works*, 261 U.S. 387 (1923) 16, 17, 18

Mountain States Legal Foundation v. *Watt*, 499 F.Supp. 383 (D.Wyo. 1980) 25

Teamsters v. *Daniel*, 439 U.S. 551 (1979) 26

Texas Oil & Gas Corp. v. *Watt*, 683 F.2d 427 (D.C.Cir. 1982) ..... passim

Texas Oil & Gas Corp. v. *Andrus*, 498 F.Supp. 668 (D.D.C. 1980) ..... passim

Tidewater Oil Co. v. *United States*, 409 U.S. 151 (1972) 26

Table Of Authorities (Continued)

CASES (Continued)	Page
Western Electric Co. v. *Burlington Truck Lines*, 501 F.2d 928 (8th Cir. 1974)	28
DEPARTMENT OF INTERIOR DECISIONS AND ORDERS	
BLM Instruction Memorandum No. 84-35 (Oct. 14, 1983)	14
John P. Dever, 67 I.D. 367 (1960)	24
John F. Richardson and Charles F. Consaul, 56 I.D. 354 (1938)	24
Mark J. Davis, Jr., 59 I.D. 65 (1945)	24
Practice Applicable to the Issuance of Oil and Gas Prospecting and Extensions of Time for Compliance with Drilling Procedures, 50 I.D. 546 (1924)	24
Robert B. Ferguson, 9 IBLA 275 (1973)	26
U.S. Department of Interior, Geological Survey, Circular 419, *The Definition of Known Geological Structures of Producing Oil and Gas Fields* (1958)	23-24
Wilmer Jeanette, 47 I.D. 582 (1920)	24
STATUTES	
5 U.S.C. §702	2, 27, 28
5 U.S.C. §706	2, 27
30 U.S.C. §181	22
30 U.S.C. §183	26
30 U.S.C. §184(h)(1)	26
30 U.S.C. §188	26
30 U.S.C. §188	2
30 U.S.C.A. §190	3, 12

Table Of Authorities (Continued)

CASES (Continued) Page

30 U.S.C.A. §355 ..... 3, 12, 29

30 U.S.C. §226 ..... 2, 5, 25

30 U.S.C. §226-2 ..... 2, 27, 28

Federal Coal Leasing Act Amendments of 1975, Pub. L. No. 94-377, §12, 90 Stat. 1090 (1976), *codified at* 30 U.S.C. §352 (1976) 4, 13, 16, 17

42 U.S.C. §7101 *et seq* 25

REGULATIONS

43 C.F.R. §3100.05(1) 2

CONGRESSIONAL MATERIALS

Hearings Before the Subcommittee on Energy and Mineral Resources of the Senate Committee on Natural Resources, 97th Cong., 1st Sess. (1981)(S.859) 12, 13

Hearings Before the House Committee on Public Lands, 65th Cong., 2d Sess. (1918) (H.R. 3232, S.2912) 22

Hearings Before the House Committee on Public Lands, 63rd Cong., 2d Sess. (1914) (H.R. 4094) 22, 25

H. Rep. No. 563, 65th Cong., 2d Sess. (May 14, 1918) 25

127 Cong. Rec. H 8026 (Nov. 4, 1981) 14

58 Cong. Rec. 4113 *et seq.* (Aug. 21, 1919) 25

56 Cong. Rec. 642 *et seq.* (Jan. 7, 1918) 22

56 Cong. Rec. 7052 *et seq.* (May 24, 1918) 22

MISCELLANEOUS

Sup. Ct. R. 17 15

Table Of Authorities (Continued)

CASES (Continued) Page

Sup. Ct. R. 21.1(b) ii

Ekberg, *Federal Oil and Gas Leasing: Developments in Selected Problems and Issues*, 29 Rocky Mtn. L. Inst. 589 (1983) 19, 26

Jaffe, Judicial Control of Administrative Action (1965) 27

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit which is sought to be reviewed here (Pet. App. Ex. 6) is reported at 734 F.2d 347. The Eighth Circuit's denial of petitions for rehearing and suggestion for rehearing en banc, dated July 3, 1984, is unreported. The opinion affirmed the opinions of the United States District Court for the Western District of Arkansas (Pet. App. Ex. 4,5), which were reported at 548 F.Supp. 466 and 562 F.Supp. 1214.

GROUNDS FOR JURISDICTION

Respondents are satisfied with the presentation of the grounds on which jurisdiction of this Court is invoked, as set forth in the Petition.

STATUTES INVOLVED

The pertinent provisions of 30 U.S.C. §§189, 226, and 226-2, and 43 C.F.R. 3100.05(1) are set forth at Pet. 7-8.

In addition, the Administrative Procedure Act, as codified, provides in pertinent part at 5 U.S.C. §702, that:

> Right of Review.
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The Administrative Procedure Act, as codified, also provides in pertinent part at 5 U.S.C. §706, that:

> Scope of Review.
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

> (D) without observance of procedure required by law;
>
> * * *
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the role of prejudicial error.

In addition, the Mineral Leasing Act, as amended, provides in pertinent part at 30 U.S.C.A. §355, that[1]

> Disposition of Receipts.
> ... all receipts derived from leases on lands acquired for military or naval purposes ... shall be paid into the Treasury of the United States and disposed of in the same manner as provided under Section 35 of the Act of February 25, 1920, in the case of receipts from sales, bonuses, royalties, and rentals of the public lands under that Act.

Section 35 of the Act of February 25, 1920 (the Mineral Leasing Act), referred to, is currently found at 30 U.S.C.A. §190, and provides in pertinent part that:

> Disposition of Moneys Received.
> All money received from sales, bonuses, royalties ... and rentals of the public lands ... shall be paid into the Treasury of the United States; 50 percentum thereof shall be paid by the Secretary of the Treasury to the State ... within the boundaries of which the leased lands or deposits are or were located; said moneys paid to any of such States ... to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted

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[1] The quoted portion of 30 U.S.C.A. §355 was added by Pub.L. 97-94, 95 Stat. 1205 (Dec. 17, 1981), which provided that it take effect "with respect to leases entered into after January 1, 1981."

by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service. . . .

STATEMENT OF THE CASE

Prior to 1976, the Secretary of the Interior was generally precluded by statute from issuing oil or gas leases on federal lands, such as those at Fort Chaffee Military Reservation, which had been acquired for military purposes. In 1976 the Congress, in the course of amending federal coal mining statutes, removed the prohibition on leasing acquired military lands,[2] although neither the Secretary of the Interior ("the Secretary") nor Arkla Exploration Company ("Arkla") was aware that the congressional action was self-executing, i.e., that lands at Fort Chaffee could be leased prior to publication of new regulations in the Federal Register.[3]

In 1977, Texas Oil & Gas Corp. ("TXO") filed applications for non-competitive, one dollar per acre oil and gas leases on Fort Chaffee lands. Processing of the TXO lease applications was delayed and it was not until June 1979 that the Bureau of Land Management office, doing the paperwork in the suburbs of Washington, D.C., had reached the point where it was necessary to seek the

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[2] Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, §12, 90 Stat. 1090 (1976) *codified at* 30 U.S.C. §352 (1976).

[3] The Secretary's position is discussed in some detail in *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427 (D.C. Cir. 1982), *reversing*, *Texas Oil & Gas Corp.* v. *Andrus*, 498 F.Supp. 668 (D.D.C. 1980). The Secretary's lack of awareness was commented on by the District Court in this case. *Arkla Exploration Co.* v. *Watt*, 562 F.Supp. 1214, 1216 (W.D.Ark. 1983).

opinion of the U.S. Geological Survey (now the Minerals Management Service) as to whether or not the lands applied for were within a "known geological structure of a producing oil or gas field", 30 U.S.C. §226, (hereinafter frequently referred to as "KGS"). If the Geological Survey (USGS) found that the lands were *not* within a KGS, they could be leased non-competitively for one dollar per acre. If the USGS concluded that the lands *were* within a KGS, they could *only* be leased competitively, after public announcement had been made of the opportunity to bid. The decision of the USGS was to be made by its Area Geologist in Tulsa, Oklahoma, Mr. Edward L. Johnson.

Because of the long delay while TXO's applications had been processed, TXO requested and was given permission to hand carry the relevant documents from the Bureau of Land Management in Silver Spring, Maryland, to Mr. Johnson in Tulsa. Two TXO executives arrived in Mr. Johnson's office with the documents on the morning of June 29, 1979.

Although Mr. Johnson, as Area Geologist, was responsible for, *inter alia*, federal lands in the State of Arkansas, he was not aware that Congress had changed the statute and was not aware that Fort Chaffee lands were available for leasing. He told the TXO officials that he could not approve their applications for that reason. They pointed out that he was in error. (Johnson dep. 42).[4]

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[4] Mr. Johnson's testimony was received below by deposition taken on September 15, 1982, and is cited here as "Johnson dep." Other record citations are to the record in the district court.

Within the next three and a half hours Mr. Johnson determined that some 33,510 acres applied for did not lie within any KGS and he approved, or "clearlisted", the dollar per acre leasing by applying a rubber stamp to the applications.

The "clearlisting" process by which Mr. Johnson determined whether lands applied for were within or without a KGS was very simple. He held the applications up to a map on the wall of his office. If the lands applied for fell within areas marked as KGS, he would disapprove the application, in whole or in part. If the lands applied for fell outside such areas, he would rubber-stamp his approval and the lands would be eligible for one dollar per acre leasing.

Mr. Johnson's map no longer exists and, as he testified, it was not possible to recreate it for use in this litigation because it could have contained some mistakes. (Johnson dep. 77). But he was able to describe in some detail the system employed in its construction, at least as he understood it.

The map consisted of a standard base map containing no geological features. On the map, a draftsman in his office was supposed to indicate, or "spot," new oil or gas wells. The draftsman, in turn, received her data (well number, production and total depth, Johnson dep. 80) from a commercial reporting service, the Petroleum Information Co. (Johnson dep. 44-48).

At some time after a new well had been spotted, Mr. Johnson would determine whether it indicated the presence of or the need to extend the existing boundaries of a KGS. The procedure he would employ was based on his own personal rule, referred to at the trial as the "one mile rule" because he never went more than one mile

from a section in which a well was located regardless of any geological facts which might suggest otherwise.[5] The map contained none of the geological data which the government officials testified was desirable or even necessary, and it did not contain the current geological data about structural analysis which TXO's own oil and gas law expert told the district court normally would be expected.[6]

The lease applications, after having been rubber-stamped in Tulsa, were then, three and a half hours later, handed back to the TXO executives who carried them back to Maryland. Some days later in July (at a time and on a date as to which there is no record in the Department's files), the leases were signed and back-dated to July 1, 1979. (Holdren dep. 15-19).

Not until after the TXO leases had been issued did the public, including Arkla, become aware of the foregoing. Thereafter, a series of events took place in rapid succession—Arkla filed an administrative Protest with the Department of the Interior on September 17, 1979, and filed suit against the Secretary on September 21, 1979. TXO, fearing that the Secretary might act on Arkla's protest, if not simply on the basis of the growing

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[5] The one mile measure, or "step out", was adopted by Mr. Johnson from a State of Arkansas well-spacing regulation.

[6] Statement to the district court by Craig R. Carver, Esquire, Transcript, Aug. 16, 1982, pp. 84-85. It is at least equally significant that Mr. Johnson's map contained no indication that the Arkansas Oil & Gas Commission had designated most of the lands in issue in this litigation, including, in particular, the Biswell Hill Anticline, as Known Geological Structures in 1968 in correspondence with the U.S. Geological Survey. Arkla Ex. 1-6, Tr. 25-34.

public concern erupting from the apparent give-away of valuable public resources, sued to restrain the Secretary from acting to cancel the leases, and on November 1, 1979, the day TXO filed its action, the Secretary cancelled the leases.[7] These events, in turn, formed the backdrop for *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427 (D.C.Cir. 1982), *reversing*, *Texas Oil & Gas Corp.* v. *Andrus*, 498 F.Supp. 668 (D.D.C. 1980).

The litigation in the District of Columbia Circuit—both at the trial and appellate level—was characterized by an awareness and general agreement among the parties that the issues raised by TXO in its litigation (i.e., the propriety of the Secretary's cancellation of the TXO leases under his procedural regulations) did not involve the "KGS" issues raised by Arkla (i.e., the issue of whether the land had lawfully been leased on a non-competitive, as opposed to a competitive, basis).

Thus, for example, on July 24, 1980, in the course of a hearing before District Judge Green, counsel for TXO explained that TXO preferred to go ahead with its litigation (challenging the Secretary's cancellation on

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[7] On September 20, 1979, the Secretary requested the U.S. Geological Survey to review Mr. Johnson's KGS determinations. That review, known as the Girard Report, concluded that, while its author was of the opinion that the decision was "correct in a legal sense," (a) more comprehensive use could have been made of the available geological data, (b) the determination was not within "the letter of the law" with respect to lands offsetting producing gas wells, and (c) because of the "very unusual circumstances regarding the lands in question," notably the high degree of exploration interest shown by competitors in the industry, Johnson "would have been more prudent" to have had the determination reviewed in light of the "controversial nature of the lands in question.

Arkla's motion to intervene in TXO's case in the District of Columbia was successfully opposed by TXO.

procedural grounds) and, if TXO could successfully establish its contentions that the Secretary's cancellation order was invalid, only then should the court turn to Arkla's KGS issues. As counsel for TXO argued to the District Court (Tr. 6-7):

> On behalf of the defendant, Texas Oil & Gas, we do not feel that this case, at this point, is moot, the *Arkla* case, because we have substantial confidence that the Court will hold that the Secretary acted improperly in cancelling the leases.
>
> Now, should the Court hold that—with our position, that the leases were improperly cancelled on November 1st, then the *Arkla* suit and the Arkla claims would continue to be, in effect, a lien, a green cloud on our title.
>
> We agree at the present time this case, we feel, should have a lower priority, in the pecking order; probably from a pure logical standpoint, it would be best to ignore the fact that the *Arkla* case was, in fact, filed first, and for the Court and counsel to direct their attention first of all to what we call the *TXO* versus *Andrus* case, which is the suit we filed November 1st, trying to set aside the Secretary's order cancelling the leases.
>
> So it would be our position at this point, at least, with the Court still having retained jurisdiction over the Secretary's action in cancelling the leases, that while the *Arkla* case, perhaps, should be put on the back burner, that it should not be dismissed.

Similarly, counsel for the Secretary agreed to litigate TXO's procedural claims to their ultimate end, and only then turn to Arkla's KGS claims, if the leases were ever to be reinstated in the TXO litigation in the District of Columbia. By written stipulation filed with the District Court on October 10, 1980, in the *Arkla* case, with specific reference to the future of the TXO litigation, counsel for the Secretary, seeking to defer judicial

consideration of Arkla's KGS claims until after final decision on the procedural issues, agreed:

> In the event that the Judgment of this Court of September 25, 1980, in Civil Action No. 79-2976 [the TXO litigation] is finally affirmed by the United States Court of Appeals or by the Supreme Court of the United States, as the case may be, this Civil Action No. 79-2501 [the Arkla litigation] may be dismissed without prejudice.

Thus both counsel for TXO and counsel for the Secretary contemplated, and agreed, that the KGS issues raised by Arkla were distinct from the procedural issues raised by TXO and could appropriately be given judicial consideration *after* TXO's claims had been resolved. Only then, after counsel for both the Secretary and Petitioner TXO had agreed that Arkla's KGS claims could be addressed at a later date, did the district judge, *sua sponte*, dismiss Arkla's case without prejudice.

The courts in the District of Columbia litigation went out of their way to preserve the distinction between TXO's procedural claims (which the courts addressed) and Arkla's KGS claims (which the courts did not address). As the district court stated in its opinion: "although the validity of the United States Geological Survey's determination that the lands on Ft. Chaffee for which plaintiff was granted leases were not within a known geological structure has come under attack both before the agency and before this Court, *that issue is not presented in this litigation.*" *Texas Oil & Gas Corp.* v. *Andrus*, 498 F.Supp. 668, 670-71 n.1 (D.D.C. 1981)(citation omitted, emphasis supplied). Nor was the issue argued before or decided by the D.C. Circuit.

Arkla's interest in these developments was considerable. It had for over a decade been requesting that the

government act to put lands at Fort Chaffee up for oil and gas leases. Arkla's interest stemmed from its position as the principal developer and producer of natural gas in northwest Arkansas, the principal operator of the wells in the vicinity of Fort Chaffee and the single most successful bidder in the competitive sales held for drainage leases on the boundaries of Fort Chaffee (drainage lease were the only exception to the former prohibition against leasing lands acquired for military purposes.)[8] Even as the TXO lease applications were being processed, Arkla was being told by the Department of the Interior that Fort Chaffee lands were not yet available for leasing. Tr. 163-164, 181, 185.

The entire affair, as suggested above, had attracted a considerable degree of public attention, in the course of which a number of members of Congress, including in particular the Arkansas delegation, became aware that the financial receipts from oil and gas leases on acquired military lands—unlike similar leases on public domain lands—were not, under then existing law, shared between the federal Treasury and the State within which the lands were located. This became a matter of more than academic concern when the very first competitive sale of gas leases under the new statute on acquired military lands was held in January 1981. That sale—which took place, as it happens, at Fort Chaffee, on the 24,000 acre parcel immediately adjacent to the lands at issue in the instant case—produced bids in some cases of over four thousand dollars per acre (Tr. 155); the total amount bid was almost forty-three million dollars ($42,983,000), for

[8] A detailed history of Arkla's continuing efforts to obtain competitive leases at Fort Chaffee was admitted at trial in Arkla Ex. 10, Tr. 140-141.

an average price of approximately $1,790.95 per acre.[9] Arkla Ex. 11, Tr. 142-151.

Shortly thereafter, the Arkansas delegations in the Senate and House introduced bills to amend the statute and provide for States to share the revenues. The bills resulted in the statutory enactment, Pub. L. No. 97-94, 95 Stat. 1205 (1981) *codified at* 30 U.S.C.A. §§190,355, set out at pp. 3-4 *supra*. The hearings before both the Senate and the House committees focused on the specific factual situation at Fort Chaffee. Thus, for example, the primary Senate sponsor of the bill, Senator Bumpers, observed in his testimony that:

> Even though this bill will cover all military reservations, the one that immediately comes to mind is *Fort Chaffee, Ark.*, which is only two miles from my home.

Hearings Before the Subcommittee on Energy and Mineral Resources of the Senate Committee on Natural Resources, 97th Cong., 1st Sess. at 4 (1981)(S.859) (emphasis supplied).

Of course, at the time in 1981 that congressional hearings were being held the TXO leases at issue here did not exist—the Secretary had cancelled them in November 1979; the D.C. district court had upheld that cancellation in September, 1980; no appellate action had taken place. Thus, the Deputy Assistant Secretary of the Interior, on behalf of the executive branch of the government, had no hesitation in asking the Congress to

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[9] That average price, applied to the 33,510 acres at issue in the instant case, would produce initial revenues to be shared by the federal Treasury and Arkansas of over sixty million dollars ($60,014,734.50), instead of the $33,510 which Petitioner TXO would have this Court approve.

rely on his categorical assurance that the only leases issued on Fort Chaffee lands were those issued competitively (in the January 1981 competitive lease sale which, as observed earlier, brought some forty-three million dollars for twenty-four thousand acres adjacent to the lands at issue in the present case.) In response to an inquiry from Senator Warner, Deputy Assistant Secretary Russell confirmed this:

> Senator Warner. Is the oil and gas lease sale that occurred this year at Fort Chaffee the first such leasing on the part of the Department of the Interior for acquired land used on military reservations?
>
> Mr. Russell. The Fort Chaffee lease sale brought in $43 million in bonus. *The bill before you today would make retroactive the sharing of revenue for that lease sale. It was the first lease sale on acquired military lands for oil and gas.*

Id. at 15 (emphasis supplied).

Thus, the legislation, which became effective December 17, 1981, was made retroactive to cover leases entered into at any time after January 1, 1981 because of the Department's assurances that the 1981 competitive sale of Fort Chaffee lands was the first sale of any lands acquired for military purposes.

Congress, responding to the position of the Department of the Interior that the *first* lease sale of acquired military lands under the 1976 enactment of the Federal Coal Leasing Amendments Act was the January 1981 competitive offering at Fort Chaffee, made its intention to cover all such lease sales clear beyond any doubt. As Congressman Trible explained, Congress intended to share the proceeds from all sales under the 1976 amendments:

> The 1976 amendments to the Mineral Leasing Act for acquired lands should have included a provision for the sharing of proceeds with State and local governments. H.R. 4591 corrects this omission, and I urge its approval by the House.

127 Cong. Rec. H 8026 (Nov. 4, 1981).

Ultimately, *Texas Oil & Gas Corp.* v. *Andrus*, *supra*, was reversed. *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427 (D.C.Cir. 1982). The mandate of the D.C. Circuit came down on July 30, 1982 and on August 4, 1982 Arkla filed the instant action. Arkansas promptly moved to intervene as a plaintiff and its motion was granted in *Arkla Exploration Co.* v. *Watt*, 548 F.Supp. 466 (W.D.Ark.) on September 20, 1982.[10]

Following trial in the western district of Arkansas, final judgment was rendered at 562 F.Supp. 1214 on April 19, 1983. The decision was appealed; argument was heard before the Eighth Circuit on September 15, 1983.

Following appellate argument, the Department of the Interior finally addressed in a direct, unambiguous fashion the practice, described earlier at pp. 6-7, of Mr. Johnson when he stepped out at most a one-mile section from producing wells to determine KGS boundaries in order to clearlist the TXO application. In BLM Instruction Memorandum No. 84-35 (October 14, 1983)(Appendix A), the Department emphatically declared:

> The simple procedure of taking the spacing unit of the producing well and the adjacent spacing units as

[10] In addition to the KGS issues, Arkansas' complaint raised claims as to the State's ownership of some of the mineral interests at Fort Chaffee which the Secretary had purported to lease to TXO. Arkansas' title claims have been deferred pending final disposition of this present action.

> a KGS is not sufficient. Although this procedure may be a good start, it does not meet the definition of a KGS either under the intent of the Mineral Leasing Act of 1920, nor does it accord with established practice prior to the last decade.

On May 7, 1984, the Eighth Circuit affirmed the judgment of the western district of Arkansas. 734 F.2d 347. The Secretary of the Interior has not sought review of that decision in this Court.

ARGUMENT

1. No Conflict Exists Between the Decision of the D.C. Circuit and the Decision of the Eighth Circuit.

It should not be suprising when petitioners seek to persuade this Court to grant certiorari by invoking one of the grounds stated in Rule 17, especially when the alleged ground is a conflict in the circuits. Sup. Ct. R. 17.1(a). Not only is the existence of a conflict one of the most frequent reasons for granting certiorari, it also underscores the importance of maintaining uniformity in the resolution of important issues of federal law.

What is suprising, however, is that Rule 17.1(a) has been invoked by the Petitioner in this case. In order to bring this case within the purview of Rule 17, the Petitioner has manufactured a "conflict" between the decisions of the D.C. Circuit and the Eighth Circuit that is neither apparent nor real.

As noted in the Statement of the Case, the issue before the D.C. Circuit in *Texas Oil & Gas Corp.* v. *Watt* was whether the Secretary of Interior had the power to cancel leases for lands acquired for military purposes which Congress had subsequently opened for leasing by statute. The D.C. Court held that the mandate of the

Federal Coal Leasing Amendments Act of 1975 was self-executing, and therefore, the Secretary could not cancel the leases *on the ground that the lands in question were not open for leasing* under the Department's unrevised regulations prohibiting leasing of acquired military lands.

Neither the District Court nor the Eighth Circuit in *Arkla Exploration Co.* v. *Watt* considered the issue of whether the Federal Coal Leasing Amendments Act of 1975 repealed the regulatory prohibition on the leasing of acquired military lands. Not only was the issue not presented to those courts, but also both courts assumed the validity of the D.C. Circuit's decision. See 548 F.Supp. at 469 (Pet. App. Ex. 4 at 8); 562 F.Supp. at 1216 (Pet. App. Ex. 5 at 5); 734 F.2d at 350 (Pet. App. Ex. 6 at 8). Rather, the question before those courts was whether, assuming that the Fort Chaffee lands were open for leasing, the geological character of the lands was arbitrarily and capriciously classified as non-KGS by the Department of Interior under the Mineral Leasing Act of 1920 and departmental regulations and prior practice.

Thus the two cases involved completely different and unrelated issues under completely different and unrelated regulatory and statutory provisions. The only similarity between the two cases is that they involved the leases for Fort Chaffee lands.

Rather than constituting a case of "conflict" under Rule 17(a), the Court here is faced with a situation similar to that in *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387 (1923). In *Layne & Bowler*, both the fifth and ninth circuits had rendered decisions in different cases alleging infringements of the same patent. As to the 20th claim under the patent, the fifth circuit

held that the device at issue did infringe and the ninth circuit found that the specific device before it did not infringe. Certiorari was initially granted on the basis of a conflict in the circuits. Upon closer inspection of the decisions, however, the Court found that, although the two circuits did reach different ultimate conclusions as to infringement on the 20th claim, their conclusions were based upon different devices, and, more importantly, different issues of law and fact. Chief Justice Taft, writing for a unanimous Court in dismissing the petition as improvidently granted, stated:

> It is manifest from this review of the conclusions in the two circuits ... that they were really in harmony, and not in conflict, and that there was no ground for allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving *principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.* The present case certainly comes under neither head.

261 U.S. at 392-292 (emphasis supplied)

Like the situation in *Layne & Powler*, this case involves different legal issues as applied to different factual circumstances. *Texas Oil & Gas Corp.* v. *Watt* involved whether the Secretary, given the Federal Coal Leasing Amendments Act, could cancel leases applied for and issued prior to revision of the regulatory prohibition on

leasing acquired military lands. *Arkla Exploration Co.* v. *Watt* involved whether it was arbitrary and capricious under the Mineral Leasing Act and departmental policy to determine the geological character of land available for leasing by making mileage measurements from producing wells. In fact the lack of a conflict in this case is even more apparent than in *Layne & Bowler.* Here, even the ultimate conclusions of the two court of appeals' decisions do not conflict.

Petitioner argues that the Secretary of Interior, by virtue of the decisions of the two courts of appeals, is faced with inconsistent mandates. How this supposed quandry faced by the Secretary of Interior affects Petitioner, a private oil and gas corporation, is difficult to fathom. Yet, assuming petitioner can legitimately raise this issue, it is pertinent that the Secretary is not seeking certiorari and, thus, presumably does not feel threatened with "conflicting" responsibilities. The Secretary's silence with regard to the two decisions is most probably due to the fact that "conflicting" mandates do not exist. Because the issue was not before it, the D.C. Circuit proceeded to resolve the cancellation issue *on the assumption* that the Fort Chaffee lands were not within a known geological structure and thus available for non-competitive bid. The district court in the District of Columbia explicitly noted that it was not deciding that issue. 498 F.Supp. 668, 671 n.1. The Eighth Circuit held that the process used by the Department of Interior in classifying the lands as non-KGS was arbitrary and ordered the Secretary to evaluate the geological character of the lands. If after that review the lands or a portion thereof are legitimately classified as non-KGS, Petitioner, per the D.C. Circuit's decision, may be entitled to the non-competitive leases because it was the

first to file. This would be the case even if the leases had been reissued before the Eighth Circuit decision. The Secretary still retains the power to cancel leases that have not been issued in accordance with law. This latter power includes the power to cancel leases because of an incorrect KGS determination. "If an offer which should be rejected in whole or in part is not rejected, and a lease is issued covering lands determined to be within a known geological structure after the determination, the lease is subject to cancellation as to those lands." Ekberg, *Federal Oil and Gas Leasing: Developments in Selected Problems and Issues*, 29 Rocky Mtn. L. Inst. 589, 634 (1983). Thus, not only did the issues differ in the two circuits, but also the conclusions are in harmony.

The Petitioner attempts to buttress its claim of "conflict" by asserting that the Eighth Circuit sat in review of the D.C. Circuit decision. This argument rests on an assumption not based in fact. What Petitioner assumes is that the D.C. Circuit, by holding that the Federal Coal Leasing Amendments Act made acquired military lands available for leasing, also *sub silentio* decided that the lands in issue were not within a known geological structure. Nowhere in the D.C. Court's decision is the latter issue considered or resolved. In effect, by illegitmately stretching the effect of the D.C. Court's decision, the Petitioner in actuality has accused that court of an abuse of the review power, rather than establishing, as it attempts, that the Eighth Circuit overreached its authority. It is an elementary proposition of appellate review that a court does not reach out to answer issues not presented to it for review or issues, as in this case, which were in no way involved or raised in the lawsuit under review by the D.C. Circuit.

A close inspection of Petitioner's argument in this regard indicates that it is based upon the dictionary interpretation of one word, "supersede", in the Eighth Circuit decision. Besides Petitioner's overbroad reading of the D.C. Circuit's decision, it is useful to note that in the ordinary course of leasing federal mineral lands, a KGS determination is made prior to lease issuance. If the KGS determination in this case had been properly made or the D.C. district court had reached the merits of Arkla's lawsuit first, Petitioner's argument would evaporate. Petitioner should not now be permitted to seize on the fortuity of the timing of two separate litigations involving different issues—of which it was continuously aware—to construct a semantical abuse of review argument.

Even assuming that under a strained analysis and dictionary approach to reading the two court of appeals' decisions some sort of ephemeral conflict can be conjured, the "conflict" is so tied to the unique factual circumstances that surrounded the two lawsuits that it is unlikely—in fact, improbable—that the "conflict" will at all affect the course of federal court decisionmaking either on the review of KGS determinations or on Secretarial power under recently enacted statutes. In fact the only way this "conflict" could affect subsequent decisions is if by some trick of history an identical pattern of factual and procedural events recurred.

2. The Eighth Circuit Closely Followed the Well-settled Interpretation of the Statute and the Department's Own Prior Interpretation of the Statute.

The Petitioner asserts that the Eighth Circuit's decision invalidates "a regulation describing administrative procedures in use for over 50 years. . . ." Pet. at 14.

Through a misreading of the Eighth Circuit decision, the petitioner seeks to persuade this Court to review an issue that in no way formed the basis of the Eighth Circuit's decision. In other words, petitioner seeks to obtain review on the basis of what it views as ill-advised dicta. See, e.g. *Keller* v. *Adams-Campbell Co.*, 264 U.S. 314 (1923)(certiorari dismissed as improvidently granted because issue presented based on dicta).

Although both the district court and the Eighth Circuit stated that the Department's regulatory definition of KGS as a "trap" appeared to be inconsistent with Congressional intent,[11] their statements to that effect did not constitute the reason underlying their invalidation of the KGS determination made for the Fort Chaffee lands. Rather than striking down the Department's regulations, the courts proceeded on the much narrower basis that the particular KGS determinations made for the specific Fort Chaffee lands under the regulations were arbitrary and capricious.

On this latter, narrower issue, the courts were undoubtedly correct. As described in the Statement of the Case, the KGS determination was made by a USGS employee, Mr. Edward L. Johnson, who merely went to a map on his office wall, pin-pointed an existing well and sometimes designated the one-mile sections surrounding the well as KGS. He would then compare the lease with the lines on the map, and rubberstamp his determination. This perfunctory process of determining the geological character of federal lands was not based on technical expertise or geological data. Rather, it was

[11] 734 F.2d at 359 (Pet. App. Ex. 6 at 26), 562 F.Supp. at 1225 (Pet. App. Ex. 5 at 26).

based upon the fact that Mr. Johnson once "had been criticized" by a superior for going beyond one mile. (Johnson dep. 197).

The capriciousness of the process employed by Mr. Johnson in determining the KGS status of the Fort Chaffee lands was exacerbated by the fact that the mileage system employed was directly contrary to the legislative intent behind adoption of the KGS language. Even a cursory review of the legislative history leading up to the enactment of the Mineral Leasing Act reveals that Congress emphatically rejected a mileage-based system for determining KGS in favor of one based on the geology of the land.[12]

The Petitioner further argues that the Eighth Circuit's affirmance of the District Court's judgment imposes on the Department of Interior a burdensome procedure for

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[12] In the years leading up to the enactment of the Mineral Leasing Act of 1920, 30 U.S.C. §181 *et seq.*, Congress extensively considered two different methods for distinguishing between valuable and high risk lands. One was to determine the boundary by miles, variously proposed at 50, 20 and 10 miles. See, H.R. 14094 *reprinted in* Hearings Before the House Committee on Public Lands, 63rd Cong. 2d Sess. at pp. 3-4 (1914) (50 miles); H.R. 3232 *reprinted in* Hearings before the House Committee on Public Lands, 65th Cong., 2d Sess. at p. 8 (1918)(10 miles); 56 Cong. Rec. 657 (Jan. 7, 1918) (20 miles; Statement of Senator Kendrick). The second alternative was to authorize the Secretary to make such determinations on the basis of geological structures. The latter alternative was adopted specifically because the "mileage" system was viewed not only as arbitrary but also because it was viewed as contrary to Congress' desire to foster incentive exploration in high risk areas. See Hearings before the House Committee on Public Lands on H.R. 3232 and S.2912, 65th Cong., 2d Sess. at 131-132, 238-240, 350-351 (1918); 56 Cong. Rec. 642, 657 (Jan. 7, 1918); 56 Cong. Rec. 7052 (May 24, 1918).

determining the KGS status of the Fort Chaffee lands. Yet again, Petitioner, on behalf of the Department, is objecting to a judgment that has not compelled the Secretary to seek review from this Court. In fact, the Secretary has recently issued a guideline implementing the suggestions of the District Court, and condemning the process for determining KGS used in this case as contrary to Congressional intent. (Appendix A).

Petitioner's argument, in this regard, is also based on a misreading of the lower courts' judgments. The district court, in sum, has merely required the Department of the Interior to consider all the available geological data before categorizing lands as KGS or non-KGS—a mandate which, as indicated above, is in compliance with Congressional intent.

Petitioner attempts to obfuscate what the lower courts required by pointing its finger at a list of geological data that the District Court ordered the Secretary to consider in determining the KGS status of only the Fort Chaffee lands. However, in so doing, Petitioner fails to inform the Court of the factual background for the list. That list does not constitute set-in-stone criteria that the Department must follow in every KGS determination. Rather, it represents specific data pertaining to the geology of the specific Fort Chaffee lands; data which the evidence established was clearly available to the employee who made the KGS determination, but who shunned it in favor of a simple mileage-based process. Contrary to the claims of Petitioner, the Department has continuously required that such data be considered when available as to a particular parcel of land. See U.S. Department of the Interior, Geological Survey,Circular 419, *The*

Definition of Known Geologic Structures of Producing Oil and Gas Fields (1958)(Ad Rec. #1). See also e.g. *John P. Dever*, 67 I.D. 367 (1960)(relying on Circular 419 to support policy of USGS that "the procedure [of Circular 419] demonstrated why most [KGS] determinations must be made without maps"). Thus, the courts did not cast aside departmental policies, regulations or rules. Rather, the lower courts merely told the Department to follow its own historic practice.

Both Petitioner and amicus also condemn the lower courts for requiring the Department to consider the exploration or competitive interest in lands before leasing. Rather than being innovative, however, the courts were again merely requiring the Secretary to follow in the case of Fort Chaffee lands, a process followed by the Department with regard to other public lands. See e.g. *Mark J. Davis, Jr.* 59 I.D. 65 (1945); *John F. Richardson and Charles F. Consaul*, 56 I.D. 354 (1938); *Practice Applicable to the Issuance of Oil and Gas Prospecting Permits and Extensions of Time for Compliance with Drilling Procedures*, 50 I.D. 546 (1924); *Wilmer Jeanette*, 47 I.D. 582 (1920). In fact, the administrative record in this case indicates that the KGS determination at issue was criticized by the person appointed by the Secretary to review it for the failure to consider the substantial exploration interest in leasing Fort Chaffee lands. (Ad. Rec. 13a).

Consideration of exploration interest is also clearly confirmed by the legislative history. The very reason that Congress chose a non-competitive bidding system for lands outside a KGS was because it would stimulate exploration of high risk territory. For lands within a

KGS, Congress felt that no such stimulation was necessary and accordingly instituted a competitive system in order to realize the highest return for the public. See e.g. Hearings Before the House Committee on Public Lands, 63rd Cong., 2d Sess. at p. 61 (1914); 58 Cong. Rec. 4113 (Aug. 21, 1919).[13] This intent was confirmed as recently as 1979 in the Department of Energy Organization Act.[14]

Petitioner and amicus, however, would condemn the lower courts for looking at "65 year old" legislative history as an exercise in "judicial legislation." Pet. at 17; Brief Amicus Curiae at 7-8. Under their approach, the courts should always confine the interpretation of Congressional statutes exclusively to the "plain meaning" of the words, no matter how ambiguous those words may be. Thus, Petitioner and amicus suggest that the courts

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[13] Contrary to the suggestions of Petitioner and amicus, the fact that an "incentive" or exploration interest underlies the mandate of §17 of the Mineral Leasing Act, 30 U.S.C. §226, has been well recognized by the Courts. See *Atlantic Richfield* v. *Hickel*, 303 F.Supp. 724 (D.Wyo. 1969) *aff'd.*, 432 F.2d 587 (10th Cir. 1970); *California* v. *Udall*, 296 F.2d 384 (D.C.Cir. 1961); *Mountain States Legal Foundation* v. *Watt*, 499 F.Supp. 383 (D.Wyo. 1980).

[14] 42 U.S.C. §7101 *et seq.* Sec. 7112 specifically provides that:

> . . . It is the purpose of this chapter—
>
> * * * *
>
> (12) to foster and assure competition among parties engaged in the supply of energy and fuels. . . .

The above is in line with the fact that from the very beginning of federal leasing under the Mineral Leasing Act, Congress has taken the position that one of the purposes of the Act was "to insure competition". H.Rep. No. 563, 65th Cong., 2d Sess. at p. 13 (May 14, 1918).

abandon a historic method of statutory interpretation[15] for one whereby courts are confined to determining the meaning of ambiguous terms without resort to any of the available aids. In other words, the courts will, unaided, give substance to Congress' words. The approach that more nearly constitutes "judicial legislation" is obvious.

3. The Decision in No Way Clouds Titles

Raising the dreaded hobgoblin of floodgate litigation, Petitioner contends that the effect of the Eighth Circuit decision will result in continuous contests over the leasing of public lands and jeopardize the title to lands already leased. Again, Petitioner has not only overstated its argument, but it has overstated both the history and the impact of this litigation.

Underlying the overdramatic verbiage of Petitioner's argument are two basic concerns: (1) that security of title is threatened by subsequent cancellation by the Secretary or the courts, and (2) that the Eighth Circuit's decision dispenses with the 90 day statute of limitations.

The first concern is easily addressed. The Secretary has always had the right to cancel leases for a variety of reasons,[16] including incorrect KGS determinations.[17] The manner by which the Secretary exercises that power is

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[15] See, e.g. *Teamsters* v. *Daniel*, 439 U.S. 551, 565-66 (1979); *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972); *Harrison* v. *Northern Trust Co.*, 317 U.S. 476 (1942).

[16] See, e.g. U.S. §§183, 184(h)(i), 188.

[17] E.g. *Robert B. Ferguson*, 9 IBLA 275 (1973)(cancellation of non-competitive lease issued 5 years earlier because of incorrect KGS determination). See also Ekberg, *Federal Oil and Gas Leasing: Developments in Selected Problems and Issues*, 29 Rocky Mtn. L. Inst. 589, 684 (1983).

certainly subject to judicial review.[18] To the extent that this long-standing power has caused panic in the industry over title to leases, its concerns are better addressed to Congress.

The Petitioner's statute of limitations concern is equally overinflated. The Eighth Circuit did not portend to dispense with the 90 day statute of limitations in 30 U.S.C. §226-2. That statute was applied even in this unusual case of lengthy, complicated litigation where all relevant parties were aware of the contested issues in each lawsuit from the very beginning.

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[18] As the district court noted it has been held repeatedly that courts can review decisions of the Department of Interior under the Administrative Procedure Act, 5 U.S.C. §§702, 706. 548 F.Supp. at 472 (Pet. App. Ex. 4 at 15). This is clearly in line with this Court's statements to the effect that there is a presumption in favor of review. E.g. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Petitioner contends that there exists no cause of action or review power because (1) no private rights of action exist under the Mineral Leasing Act and (2) KGS determinations are committed to agency discretion.

With regard to the former claim, 30 U.S.C. §226-2 clearly contemplates judicial review. The cases relied upon by Petitioner (Pet. at 21-22), as the Eighth Circuit correctly noted, involved private rights of action for damages against private defendants and not judicial review of an agency decision. 734 F.2d at 354 (Pet. App. Ex. 6 at 17).

In support of its latter claim, petitioner cites two cases decided prior to the APA. See 734 F.2d at 355n11 (Pet. App. Ex. 6 at 18n11). It also refers to one ambiguous comment by a congressman in the legislative history. Pet. at 16. "The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories*, 387 U.S. at 141 *quoting* Jaffe, Judicial Control of Administrative Action at 357 (1965).

Petitioner attempts to suggest otherwise by ignoring the procedural and factual history of this lengthy litigation. When Arkla first filed suit on September 21, 1979, there was conceded compliance with the statute of limitations (the leases were executed as of July 1, 1979). Yet, after that suit was filed, the Secretary cancelled Petitioner's leases. After that action was taken, as the Eighth Circuit correctly noted, "there did not exist a situation adverse to Arkla." 734 F.2d at 356 (Pet. App. Ex. 6 at 20). Under both §226-2 and the APA, 5 U.S.C. §702, an *adverse* final decision is necessary in order to trigger the ability to sue and the statute of limitations. See, e.g. *Western Electric Co.* v. *Burlington Truck Lines*, 501 F.2d 928, 935-936 (8th Cir. 1974). This latter situation existed for Arkla until the D.C. Court of Appeals on July 30, 1982 reversed the Secretary's cancellation order and transmitted notice to the District Court of its action. Arkla again filed suit 4 days later.

Even under generally accepted equitable principles, the Eighth Circuit's decision was far from novel and clearly correct. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 76 L.Ed. 2d 628, 635 (1983). At every turn, Arkla diligently pursued its claims. Petitioner, during the entire period of this litigation, was on notice of Arkla's claims that the leases were unlawful. In fact, counsel for Petitioner admitted before the D.C. district court that even if it ultimately succeeded in *Texas Oil & Gas Corp.* v. *Watt*, further hearings would be appropriate on Arkla's KGS claims. See *supra* pp. 8-9.

The suit by the State of Arkansas also clearly was within the letter and spirit of 30 U.S.C. §226-2. Arkansas

was not granted any interest in the proceeds from military lands until January 1, 1981. 30 U.S.C. §355. See also discussion, *supra* pp. 11-14. The impetus for the Act of Congress was specifically due to the leasing controversy surrounding the Fort Chaffee lands. Yet, at the time that statute was passed, Petitioner's leases had been cancelled and that action had been upheld by the D.C. District Court. In fact, Congress proceeded on the assumption that Petitioner's leases were cancelled. Thus, Arkansas was not injured by the erroneous KGS determination which deprived it of substantial revenues until the date of the D.C. Court of Appeals decision. Like Arkla, there existed no outstanding order adverse to the interests of the State of Arkansas. Arkansas filed suit on August 18, 1983 and, therefore, filed well within the 90 day period.

Petitioner's concern that the Eighth Circuit's decision means that states will not be bound by the limitations period is therefore in error. Not only was Arkansas' suit timely filed, but also, given the unique set of facts and surrounding circumstances presented by this litigation, a situation like that faced by Arkansas will never recur.

CONCLUSION

The decision below did not give rise to any conflict among the circuits; nor did it strike down an agency regulation. The decision below merely applied long-standing rules of law and administrative practice. In addition to complying with the law, the decision was fair and represented sound, congressionally recognized public policy. The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

October 14, 1983

Instruction Memorandum No 84-35
Expires 9/30/84

To: All State Directors

From: Director

Subject: Procedures for Delineating the Area to be Included Within Known Geological Structures of Oil and Gas Fields

A known geologic structure of a producing oil or gas field is defined as "the trap, whether structural or stratigraphic, in which an accumulation of oil or gas has taken place. The limits of such structure according to Geological Survey Circular 419 include all acreage that is presumptively productive". In the Geological Survey Circular 419, it is stated: "On April 16, 1936, a decision by the Secretary of the Interior (Columbus C. Mabry, 55 I.D. 530) held (syllabus):

> The defining of the boundaries of the geologic structures of producing oil and gas fields, under authority of section 32 of the Leasing Act, is for administrative purposes and is not a guaranty of geologic character. Accordingly, such boundaries are not to be taken as absolutely and accurately showing the extent in each instance of the geological structure producing oil or gas, but they may later be extended or reduced to accord with the facts.
>
> This premise recognizes that structural traps or "known geologic structures' can be more extensive

than the pools of oil or gas they may contain. Known geologic structure definitions are made after evaluation of all controlling fractures, and such definitions are made conformable to the dominant structural feature involved."

Due to the priority of other programs, it has not been possible to dedicate.sufficient personnel to make KGSs based on extensive geologic interpretation. The simple procedure of taking the spacing unit of the producing well and the adjacent spacing units as a KGS is not sufficient. Although this procedure may be a good start, it does not meet the definition of a KGS either under the intent of the Mineral Leasing Act of 1920, nor does it accord with established practice prior to the last decade.

The following procedure should now be followed in determining the extent of a KGS:

1. Have current maps available or construct maps showing location of wells and their status, distribution of Federal lands, structure on one or more key productive horizons, and oil or gas water contacts where know.
2. For structurally controlled accumulations, the boundary of the KGS is made concordant with a contour somewhat below the oil-water or gas-water interface, but not below the spill point of the trap. If an oil or gas water contact is not known, a closed structure such as an anticline or fault trap may be assumed to be presumptively productive to the spill point, and the KGS should be determined by the lowest known closing contour. Complex traps exhibiting both structural and stratigraphic control should be treated in the same way if it can be resonably inferred that the stratigraphic conditions necessary for entrapment occur throughout the structure under consideration. It should be noted that this type of KGS may be fully defined very early in the exploration

process. Prudhoe Bay, the largest oil field in America was fully defined and its resources were calculated using geophysical maps and the first three wildcat wells.

3. For stratigraphically controlled accumulations occuring with no structural closure rely first on the geological interpretation of the nature of the trap. A pinchout of a major sandstone such as the Woodbine of East Texas can be demonstrated to be very extensive with very few drill holes.In some areas, geological setions occur in which small porous sand bodies are found which contain gas or oil on a very predictable basis such as in the Green River Basin of Utah, Delaware Basin of New Mexico, and certain areas in Wyoming. These areas should be delineated on the basic net pay, net sandstone or other applicable map. It should be noted that these areas may be large, sometimes covering many townships.
4. As a general rule, the minimum size for a new KGS is the spacing unit and the surrounding spacing units, unless there is good geologic reason that one or more of those units have no potential for oil production, such as occurring on an upthrown block of granite.
5. All participating areas must be included in KGS.
6. All shows and reservoirs left behind pipe must be considered in KGS determinations.

Further reference on KGS determinations which should be available to all personnel working on them include:

The Definition of Known Geologic Structures of Producing Oil and Gas Fields, U.S. Geological Survey Circular 419 (1959), Emmett A. Finley

Branch of Mineral Classification Handbook of Instructions, U.S. Geological Survey (1960) Chapter V—Classifications—Oil and Gas Classification, Known Geologic Structure, pp. 120-128.

Geological Survey—Conservation Division Manaul, Chapter 3—Known Geologic Structure (KGS) Determinations, Part 620.3.1 (1980)

Hillary Orden will be contacting a number of you to set up meeting with your appropriate minerals personnel during the week of October 17. At the meeting Hillary and others from this office will field any questions on these procedures and discuss any necessary personnel re-allocation to accomplish the task. He will also discuss the necessary clearlisting process and procedures to which you will be required to certify.

For further information, please call Gary Horton (653-2269) or Robert Schrott (653-2279).